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IN THE SUPREME COURT
of the
STATE OF UTAH

WYCOFF COMPANY, INC.,

Plaintiff,

—vs.—

PUBLIC SERVICE COMMISSION
OF UTAH; HAL S. BENNETT,
DONALD HACKING and JESSE
R. S. BUDGE, Commissioners of the
Public Service Commission of Utah;
BARTON TRUCK LINE, INC.;
BEEHIVE MOTOR LINES, and
CARBON MOTORWAY, INC.

Defendants.

FILED

Mark, Supreme Court, Utah

Case No.
9717

BRIEF OF DEFENDANTS

BARTON TRUCK LINE, INC., AND
PUBLIC SERVICE COMMISSION OF UTAH

Appeal from Order of the Public Service Commission
of Utah

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BRIEF OF DEFENDANTS
BARTON TRUCK LINE, INC., AND
PUBLIC SERVICE COMMISSION OF UTAH

STATEMENT OF KIND OF CASE BEFORE
THE PUBLIC SERVICE COMMISSION

Plaintiff has appealed from a Report and Order of
the Public Service Commission of Utah in a proceeding

where Barton Truck Line, Inc., was granted authority to serve as a common carrier from points north of Ogden to the Idaho State Line.

DISPOSITION OF CASE

Following are listed the respective applications pending before the Commission :

1. Barton Truck Line, Inc., Case No. 4009-Sub 7;
2. Beehive Motor Lines, Case No. 5102;
3. Carbon Motorway, Inc., Case No. 3815-Sub 8;
4. Wycoff Company, Incorporated, Case No. 4252-Sub 10.

Hearings were held on the above named applications commencing April 11, 1962, and were held in successive order until completed. On May 14, 1962, the Commission entered its Report and Order, together with Findings of Fact and Conclusions of Law in support thereof (R. 1081 to 1091). From this Report and Order an appeal was commenced by Plaintiff.

STATEMENT OF FACTS

This appeal is taken as against multiple defendants. Defendant Barton Truck Line, Inc., answers Plaintiffs' brief solely on its behalf and on behalf of the Public Serv-

ice Commission of Utah and its commissioners inasmuch as the other named Defendants in Plaintiff's brief have separate interests and separate counsel.

In the instant case, Defendant Barton Truck Line, Inc. (hereinafter referred to as Barton) possessed authority, so far as is material here, to transport general commodities as a common carrier from Salt Lake City, Utah, to Ogden, Utah, as well as in between points.

Wasatch Fast Freight, a Utah corporation (hereinafter referred to as Wasatch) a wholly owned subsidiary of Consolidated Freightways, held similar authority between Salt Lake City and Ogden, and further, had general commodities authority from points north of Ogden to the Idaho state line. Wasatch had petitioned the Public Service Commission of Utah for permission to abandon its authority and for permission to terminate operations thereunder. Subsequently, Barton applied to the Public Service Commission to extend its existing operating authority to the Idaho state line.

In addition to the application of Barton, Beehive Motor Lines (hereinafter referred to as Beehive) a newly formed corporation, applied for a Certificate of Convenience and Necessity to replace Wasatch in the area then being served by Wasatch. The application of Beehive was, in effect, identical to the Certificate sought to be abandoned by Wasatch.

Carbon Motorway, Inc. (hereinafter referred to as Carbon) applied for permission to serve as a common carrier for only a portion of the area which Wasatch sought to abandon. Carbon had existing authority to haul to points south of Salt Lake City in the general direction of Price, Utah.

Wycoff Company, Incorporated, plaintiff herein, was then operating under a Certificate which enabled it to transport express shipments from Salt Lake City to points north of Ogden and to the Idaho state line. Wycoff's authority allowed it to handle shipments not to exceed 100 pounds per shipment and not to exceed 500 pounds per load. The Wycoff case, as presented, sought to broaden its existing express authority so as to enable Plaintiff to haul larger quantities of goods as well as greater weights than were presently authorized.

At the commencement of the Barton case, a motion was made to consolidate hearings on all of the applications and have them heard in the form of a single hearing (R. 9). This motion was denied and each application was heard on its merits, placing each applicant on its own burden of proof (R. 10). At the termination of the Wycoff hearing, being the last hearing, a new motion was made to consolidate the testimony and evidence adduced in the respective hearings for purposes of enabling the Commission to consider all evidence in arriving at its Report and Order. This motion was granted. (R. 1037).

Plaintiff was represented for testimony by Mr. Max Young, business manager of Wycoff. The testimony of Young, at the commencement of the Wycoff proceeding, was designed to establish the exact nature of the Wycoff application. Counsel for Plaintiff propounded questions to Mr. Young aimed at establishing the nature of the service as proposed by Wycoff.

"Q. What type of service would you propose in the area covered by this application?

A. We propose to offer scheduled service north-bound from Salt Lake City, using all the schedules we now have available moving through the area of express nature handling shipments as tendered from consignor to consignee on a full seven day per week basis."
(R. 861)

Subsequently, in Mr. Young's testimony, the Commission, along with counsel for Carbon, desired to have a definition of what Plaintiff, in its application and the foregoing answer, meant by the term "express."

"MR. PUGSLEY: May we have Mr. Young answer that?

"WITNESS: Yes, express is the expedited movement of material on a scheduled basis without delay due to dock handling or paper work involved." (R. 866)

In attempting to further define what was meant by this term, the Commission, by and through Commissioner Budge, propounded the following question to Mr. Young:

“COM. BUDGE: Let me understand Mr. Young. You say that you recognize no limitation of weight if the shipper and consignee desire the commodities sent by express, which I assume means if they are prepared to pay express rates on it?

“WITNESS: That is correct, yes, sir.” (R. 867)

After this testimony, Plaintiff then proceeded to call its witnesses. Plaintiff would have formulated a voluminous amount of repetitious evidence had counsel for the other applicants not entered into the following Stipulation:

“MR. PUGSLEY: It is proposed, if called, that the witnesses whom we will enumerate, as to their own businesses would testify first that they have used the Wycoff Company services in the past and at the present time in other areas in Utah and found the service to be satisfactory for their business.

“Second, that such companies have frequent shipments to points north of Salt Lake and will itemize the nature of the commodities they handle

and that those commodities have an urgency of delivery. That they would request the Commission provide a service for them by way of Wycoff.

"Third, that the abandonment of the Wasatch Fast Freight service in their opinion makes it necessary for an additional carrier to be authorized. That for their business there is a need for an additional carrier into the area north of Salt Lake.

"Fourth, that they have used or are familiar with the other carriers that are available to points north of Salt Lake.

"Last, that if the Wycoff service is authorized, they will use that service." (R. 957, 958)

Plaintiff refers in its brief to numerous shipper witnesses who testified and the validity of their testimony not be controverted. However, for purposes of clarifying the facts as stated by Plaintiff, Defendant wishes point out to the Commission the following statistics:

1. Of the shipper witnesses called by Plaintiff, six testified that they did not require the services of Wycoff in excess of their present authority.
2. Three of the shipper witnesses utilize their own vehicles into the area in question.

STATEMENT OF POINTS

POINT I

THE COMMISSION ACKNOWLEDGED AND RULED IN ACCORDANCE WITH LAW IN GRANTING AUTHORITY TO BARTON.

POINT II

THE COMMISSION HAS BY IMPLICATION THE RIGHT TO CONSIDER THE BUSINESS CHARACTER OF AN APPLICANT TO DETERMINE THE ADVISABILITY OF GRANTING AUTHORITY TO AN APPLICANT.

ARGUMENT

POINT I

THE COMMISSION ACKNOWLEDGED AND RULED IN ACCORDANCE WITH LAW IN GRANTING AUTHORITY TO BARTON.

For purposes of Defendant's brief, we will endeavor to answer the first three varied but similar contentions of Plaintiff under a single point of argument.

With respect to reference by Plaintiff to the Sec-

tions of the Utah Code Annotated, 1953, 54-6-4 and 5, Defendants contend that fair import is not given to these statutes. Plaintiff has failed to recognize that each of these statutes must be considered jointly with the other, as well as the remaining portions of Section 6, Title 54, Utah Code Annotated, 1953. In 54-6-4, Utah Code Annotated, 1953, the Code states:

"The Commission is vested with power and authority, and it shall be its duty . . . to insure adequate transportation service to the territory traversed by such common motor carrier . . . so as to prevent unnecessary duplication of service between these common motor carriers. . . "

The last portion of 54-6-5, Utah Code Annotated, 1953, reads as follows:

"If the Commission finds that the applicant is financially unable to properly perform the service sought under the certificate, or that the highway over which he proposes to operate is already sufficiently burdened with traffic, *or that the granting of the certificate applied for will be detrimental to the best interests of the people of the State of Utah, the Commission shall not grant such Certificate.*" (Emphasis ours.)

Plaintiff, on page 25 of its brief, has attempted to pass over the italicized portion of the foregoing by assert-

ing that no statement is present in the Findings of Fact as pertains to the Plaintiff. This is an obvious fallacy. Directing the Court's attention to the Record at page 1087, the Commission specifically found that the granting of Plaintiff's application would be detrimental to existing carriers and is logically detrimental to the people of the State of Utah:

“Such an authority would undoubtedly seriously affect the express service of Lake Shore Motor Coach Lines, Inc., which transports express between Salt Lake City and Ogden and would affect general commodities carriers as well, for by transporting at express rates shipments of even 100 pounds in weight, it would seriously divert business from other express carriers whose weights for express shipments do not exceed 100 pounds, while the transportation of shipments at express rates of articles heavier than 100 pounds would divert from other common carriers commodities which have never been classified as express.” (R. 1087)

The Commission found with respect to the Wasatch Fast Freight operation, that it had operated as a common motor carrier in the transportation of general commodities between Salt Lake City and the Utah-Idaho state line, and intermediate points. It further found that Wasatch was losing in excess of \$10,000.00 per month of operation. (R. 1085)

Barton submits that the Commission had full author-

ity to consider this finding in determining the amount of carrier service, if any needed, to replace the service provided by Wasatch in the event that its petition for abandonment was granted.

Mr. Harold Tate, Vice President and General Manager of Barton, testified that since the commencement of the Barton authority from Salt Lake City to Ogden and intermediate points, the Barton operation had progressed slowly (R. 842). He further testified that Union Pacific Motor Freight handled a large amount of traffic and that Barton's business, although slow in developing, had "... just recently reached a point where we feel it has been compensatory." In reliance upon an increasing and finally compensatory business, Mr. Tate further testified:

"Q. Have you secured new equipment to service this haul, Mr. Tate?

A. As this traffic developed over the past two and a half years, additional equipment has been required and we have been adding to our fleet not only power units, but pickup units, trailers designed to adequately take care of our shipping problems." (R. 842, 843)

In the case of *Salt Lake and Utah Railroad Corporation vs. The Public Service Commission*, 106 Ut. 403, 149

P.2d 647, 649, this Court held that the Commission was entitled to consider the impact of additional competition on the revenues of existing carriers. The Court reasoned that adequate carrier revenues were necessary in order to insure the ability of existing carriers to serve the public and this aspect of the statutes should be considered in determining convenience and necessity.

Referring now to the Stipulation entered into between the respective counsel for the receiving of testimony of shipper witnesses en absente, Defendant submits that no where in the Stipulation, which counsel for the Plaintiff proposed, is there a statement that the absent shipper witness would testify to a need of different service than Wycoff is presently performing under its existing authority. The testimony of the shippers who personally testified likewise fails to establish this need. All but two testified merely that they were currently using the Wycoff service or had used it. In the brief of Plaintiff, reference is made to the wants and needs of Plaintiff's 28 shipper witnesses (page 25). Plaintiff argues that the express service proposed by Wycoff would be responsive to the requests of the shipping public and that all 28 shippers testified that they desired the Wycoff service as applied for. This is a misrepresentation to the Court as only 16 of Plaintiff's witnesses testified as to their needs in excess of the existing Wycoff authority. Furthermore, their testimonies clearly show that the existing authority of Wycoff is adequate to handle the

requirements of these shippers: (R. 829), witness — Vordos, (10 to 15 lbs.); (R. 887), witness — Hanson, (30 to 60 lbs.); (R. 900), witness — Bateson, (less than 100 lbs.); (R. 904), witness — Carlson, (30 to 70 lbs.); (R. 908), witness — Thornton, (15 to 45 lbs.); (R. 934), witness — Knudsen, (2 to 30 lbs.); (R. 961), witness — Bates, (25 lbs.); (R. 963), witness — Brown (5 to 90 lbs.); (R. 964), witness — Waldron (1 to 40 lbs.); (R. 964), witness — Koch (40 to 80 lbs.); (R. 964), witness — Bluhm (1 to 100 lbs.); (R. 967), witness — Paxton (30 to 70 lbs.); (R. 967), witness — Parkinson (10 to 60 lbs.); (R. 967), witness — Manos (50 to 100 lbs.); (R. 967), witness — Snyder (10 to 100 lbs.); (R. 961), witness — Peterson (50 to 90 lbs.).

Plaintiff contends in its brief that the findings of the Court require additional carrier service to points north of Salt Lake City (page 21). The basis of Plaintiff's argument is predicated upon the Stipulation for shipper witness testimony in this case which states as follows:

“ . . . That the abandonment of Wasatch Fast Freight service in their opinion makes it necessary for an additional carrier to be authorized.” (R. 957)

For the Commission to accept this opinion request without considering the impact and repercussion on other carriers is obviously contrary to law. Furthermore, it

should be obvious that the mere Stipulation of counsel for the transportation companies that witnesses would conclude that *additional* service was necessary is not binding upon the Commission so as to require it to authorize additional service. The law imposes upon the *Commission* the duty of determining public convenience and necessity and not upon *counsel* or the *witnesses*. (54-6-5 Utah Code Annotated, 1953) Further, Defendants submit that the Commission covered this matter in its Findings of Fact, Paragraph 2, wherein the Commission found:

“2. With abandonment of service by Wasatch Fast Freight it is a public necessity that a *new service* for the area between Salt Lake City and the Utah-Idaho State Line be provided and the Commission is obligated to determine on the basis of the consolidated record and the public interest, which of the four applicants should be granted authority to render such service.” (R. 1085)

Defendants submit that the Commission had another basis for finding that Wycoff was not a proper applicant for the service in question. Wasatch sought to abandon a *freight* service whereas Wycoff sought a vague unlimited authority which it claimed was an express service. By an admission of Plaintiff's own agent, no void in the needs of the shipping public would be filled by granting authority to Wycoff as a replacement service for that of Wasatch.

"Q. Would you say then, in your opinion, that Wasatch has been performing an express service?

A. No." (R. 1018)

Mr. Young further testified as follows:

"Q. And you don't intend to engage in the transportation of commodities that are presently being handled by the existing carriers in that particular area, such as Barton and Wasatch Freight at the present time?

A. I think that is basically true. However, we do think we will get some of the small shipments involved. We think that we will get some of the small shipments that perhaps Barton is now carrying.

Q. But as to the large shipments, you do not contemplate handling those?

A. We could handle them.

Q. Do you contemplate handling them under this application if it were granted?

A. I think our rates would preclude us from handling them.

COM. BUDGE: The heavy shipments?

WITNESS: Yes, sir.

Q. Would it be fair to say then that you don't contemplate publishing a tariff to handle those type of shipments?

A. Not at all.

Q. Then what do you mean, your rates would preclude you from handling them?

A. We propose to develop rates similar to those we now have on file with the Commission. We think those rates, if accepted, would preclude shippers from moving large shipments with us in our service.

Q. You mean because of the expense?

A. Yes.

COM. BUDGE: Mr. Young, I am a little confused. I understood you to say on your direct examination that you intended to file some additional tariffs?

WITNESS: Yes, sir, we do.

COM. BUDGE: Now, will those tariffs differ from your present tariffs?

WITNESS: Just in that area, if we are given the authority that we have made application for beyond the hundred-pound weight per shipment limitation.

COM. BUDGE: All right. That weight beyond the hundred pounds you might regard as express?

WITNESS: Yes.

COM. BUDGE: Anywhere beyond a hundred pounds?

WITNESS: Yes.

COM. BUDGE: And whether it would be regarded as express or whether it would be regarded as freight would depend on whether the consignee or shipper was willing to pay express rates or freight rates?

WITNESS: Yes.

COM. BUDGE: So you might haul as express under your definition, any commodity, prac-

tically any commodity that is now hauled by Barton or any other truck line, if the shipper thought their need was great enough to pay the rate?

WITNESS: Yes." (R. 1010-1012)

The application of Plaintiff on its face is vague, which fact is supported by testimony of Mr. Young on cross-examination:

"Q. If it isn't time that differentiates express from freight alone, is cost the item that is the differentiation between freight and express?

A. Not entirely. I think it is a combination of all of those factors.

Q. The two factors of time and cost?

A. Those are two items, yes. I don't know what you mean by time.

Q. Speed of pickup and speed of delivery to the ultimate consignee.

A. I think that is important, yes.

Q. Are these the only two elements in your definition that constitutes the difference between ordinary freight and express?

A. I would say the two very important points.

Q. You haven't answered me. Are these the only two or are there others?

A. There would possibly be others.

Q. You can't think of any right now?

A. No." (R. 1022, 1023)

* * *

"Q. If I were to tell you that you could reduce your rates without a hearing, to the level or below that of the regular line haul carriers, that would eliminate one of the restrictions which you propose between express and freight, would it not?

A. No.

Q. It would not?

A. No.

Q. Why would it not?

A. Because we would not publish that rate. Our proposal isn't that we publish a rate lower than a common carrier at all." (R. 1024, 1025)

The application of Wycoff would cast the remaining carriers into a position of having their authority infringed upon because of indefinite limits on the authority of Wycoff. The Commission is bound by law to defend the authorities of carriers and to "... prevent unnecessary duplication of service between these common motor carriers. . . ." (54-6-4, Utah Code Annotated, 1953) Under these circumstances, the Commission must, as a matter of law, deny Wycoff's application in the interest of the shipping public as well as the protection of existing carriers from undue hardship and unfair competition.

The Commission found: "Furthermore, permitting the shipper the right to determine what is express and what is freight, would constitute an abdication by the Commission of its authority to classify shipments and to fix and approve tariffs which are to apply to the different weight commodities." (R. 1087)

In view of the foregoing, defendants contend that the Commission would be acting in excess of its jurisdiction and without regard to public interest had it granted

plaintiff's application, for all of the carriers serving the area in question would be in continual litigation with plaintiff in attempting to establish the extent of their respective rights and to prevent infringement thereon by the plaintiff. The application, as proposed, together with a definition of express as propounded by Mr. Young when coupled with the rate proposal, would have created chaos. On the other hand, granting the application of Barton to serve the area north of Ogden will afford strictly defined limits so as to control its operation. This is in the best interests of the public need and it will also satisfy the requirements of convenience and necessity in accordance with the laws of the State of Utah.

POINT II

THE COMMISSION HAS BY IMPLICATION THE RIGHT TO CONSIDER THE BUSINESS CHARACTER OF AN APPLICANT TO DETERMINE THE ADVISABILITY OF GRANTING AUTHORITY TO AN APPLICANT.

In Title 54-6-5, Utah Code Annotated, 1953, the Commission is specifically directed to find that the granting of an application is "... in the best interests of the people of the State of Utah . . ." Plaintiff does not claim that the Commission relied *solely* upon the failure of Wycoff to adhere to an Order. The Commission and Defendants acquiesce to this argument. However, Defendants submit that such willful acts of Plaintiff in violating a Com-

mission Order is evidence of Plaintiff's lack of desire to be bound or regulated in any manner by the Public Service Commission. Defendants submit that the best interests of the people of the State of Utah require that the Commission consider the demeanor of an applicant as one element in ascertaining the desirability of such an applicant as a public servant.

CONCLUSION

Defendants submit that the only question before the Court is whether or not there exists competent evidence in the Record to support the Order of the Commission. Defendants assert that such evidence is in the Record, and that this honorable Court should sustain the Order of the Commission.

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